

EXHIBIT 98

<p style="text-align: right;">Page 2219</p> <p>1 is clear, I want to be clear that we do object. We 2 appreciate everyone's effort in setting up the 3 video, nonetheless, we think the jurors all need to 4 be present to evaluate the demeanor of the 5 witnesses, to see the exhibits, to hear the 6 testimony. 7 Under this circumstance, we will not 8 know whether this juror in fact does watch the 9 testimony and see the exhibits, and we have never 10 seen this in another trial. We think it's -- raises 11 serious concerns, so we do object. 12 THE COURT: All right. Your 13 objection is noted for the record. 14 MR. TRAVELL: Your Honor, Mr. Zou 15 joins in that objection. 16 THE COURT: All right. 17 Just for record, the juror of which 18 we're speaking is the second alternate, so there's a 19 decent chance, anyway, that he will not be on the 20 final jury anyway, but we'll see how that goes. 21 All right. Are you prepared to 22 question the witness?</p>	<p style="text-align: right;">Page 2221</p> <p>1 Do you recall that? 2 A. Yes, I do. 3 Q. You testified that Pegasystems 4 acknowledged that they were learning things about 5 Appian software that they did not previously know. 6 Do you recall that? 7 A. Yes, I do. 8 Q. Now, Dr. Cole, based on your review of 9 the evidence in this case, can you identify some of 10 the specific trade secrets that Mr. Zou disclosed to 11 Pegasystems? 12 A. Yes, I can. 13 Q. Can you please do that for the jury. 14 A. Yes. 15 So one of them is concurrent 16 development. So in Appian's software, when one 17 developer is utilizing a process, it's locked, and 18 no other developers can go in and access that 19 process. 20 So a little more specifically, if 21 you have a process that has multiple objects in the 22 development environment and a developer is working</p>
<p style="text-align: right;">Page 2220</p> <p>1 MR. GINSBERG: I am, Your Honor. 2 THE COURT: Okay. All right. Let's 3 bring the jury in then. 4 (The jury entered the courtroom.) 5 THE COURT: All right. All members 6 except Juror Number 43 are present. 7 Mr. Ginsberg, are you prepared to 8 continue your examination. 9 MR. GINSBERG: I am, Your Honor. 10 THE COURT: Sir, if you would have a 11 seat. I remind you, sir, that are you still under 12 oath. 13 THE WITNESS: Thank you. 14 CONTINUED DIRECT EXAMINATION 15 BY MR. GINSBERG: 16 Q. It's still morning. Good morning, 17 Dr. Cole. 18 A. Good morning. 19 Q. I believe we left off last week with 20 your testimony about a video clip showing Mr. Zou 21 providing Pegasystems with access to Appian's 22 software in a development environment.</p>	<p style="text-align: right;">Page 2222</p> <p>1 in one of those objects, the entire process, all of 2 those objects are locked, and no one else would be 3 able to access any of those other objects. 4 A second one is on the web services. 5 It only returns back a process ID. So it's limited 6 in the information it provides back, just that 7 process ID, and in order to be able to go in and get 8 other information or other details, it's a fairly 9 complex workaround that has to be done within 10 Appian's system. 11 Then the third one is checkpointing. 12 Checkpointing is a process where you're writing 13 information to memory, and if you've ever had on 14 your computer, that's volatile. So if your computer 15 goes down, you lose the information. So checkpoint 16 is the process of taking information in volatile 17 memory and writing it to a hard drive. 18 Well, when that happens, there's 19 performance impacts on the system, and the specific 20 trade secret was the exact checkpointing settings 21 and parameters that were within Appian's software. 22 Q. Have you heard of reporting tools and</p>

<p style="text-align: right;">Page 2223</p> <p>1 chart types?</p> <p>2 A. Yes, I have.</p> <p>3 Q. Are you aware as to whether or not</p> <p>4 Mr. Zou shared any confidential information about</p> <p>5 Appian's reporting tools and chart types with</p> <p>6 Pegasystems?</p> <p>7 A. Yes, he did. The core of all of the</p> <p>8 trade secrets is really going in to the development</p> <p>9 environment, the Appian Forum that contains Appian's</p> <p>10 trade secrets, and really showing in detail how it</p> <p>11 works and how it operates.</p> <p>12 So with the reporting, at the time,</p> <p>13 Appian's software had limited reports that it could</p> <p>14 display. So if Pegasystems was aware of that and</p> <p>15 knew that it had limited reporting, that's something</p> <p>16 that they could use against Appian in their sales</p> <p>17 efforts.</p> <p>18 Q. How about unified management tools. Is</p> <p>19 that something that Mr. Zou was sharing with</p> <p>20 Pegasystems?</p> <p>21 A. Yes, it was.</p> <p>22 So unified management tools is the</p>	<p style="text-align: right;">Page 2225</p> <p>1 BY MR. GINSBERG:</p> <p>2 Q. How about, have you ever heard the term</p> <p>3 "topology"?</p> <p>4 A. Yes, I have.</p> <p>5 Q. Are you aware as to whether or not</p> <p>6 Mr. Zou was sharing confidential information about</p> <p>7 Appian's topology with Pegasystems.</p> <p>8 A. Yes, the topology is the setup or</p> <p>9 configuration of the system. It's how all of the</p> <p>10 different pieces work together. It's basically</p> <p>11 essentially the brains of the interaction.</p> <p>12 Once again, this information was</p> <p>13 only available within the development environment,</p> <p>14 and Mr. Zou went in and went through the development</p> <p>15 environment, and showed exactly how the topology was</p> <p>16 set up and how it worked and operated.</p> <p>17 From a competitor's standpoint, if</p> <p>18 you know your competitor's product, how it works in</p> <p>19 detail, the trade secrets of how it operates and</p> <p>20 interacts, you can then more effectively compete</p> <p>21 against them in the market.</p> <p>22 Q. I believe we have heard some testimony</p>
<p style="text-align: right;">Page 2224</p> <p>1 ability to be able to manage the performance of all</p> <p>2 of the processes that are running on the system.</p> <p>3 Once again, Appian's software did not have that</p> <p>4 capability built into the software, but you would</p> <p>5 only be able to know or determine that by going in</p> <p>6 to the development environment, accessing the trade</p> <p>7 secrets and seeing that information.</p> <p>8 Q. Have you ever heard of the term "star</p> <p>9 schema"?</p> <p>10 MR. BOOKBINDER: Objection, Your</p> <p>11 Honor. Leading.</p> <p>12 THE COURT: Overruled.</p> <p>13 THE WITNESS: Yes. Star schema is a</p> <p>14 common protocol in the industry in terms of how you</p> <p>15 report and send information. And Appian's software</p> <p>16 did not support star schema.</p> <p>17 Once again, that would only be</p> <p>18 information if you went into the development</p> <p>19 environment and see that, and it was a trade secret</p> <p>20 because it's not something that was publicly known,</p> <p>21 and if Pega knew that information, they could use</p> <p>22 that to compete against Appian.</p>	<p style="text-align: right;">Page 2226</p> <p>1 in this case about Appian's documentation.</p> <p>2 What is your understanding of</p> <p>3 Appian's documentation?</p> <p>4 A. Appian's documentation at the time with</p> <p>5 Zou of 2012 to '14 was only available within the</p> <p>6 Appian Forum, which was only accessible if you had</p> <p>7 the user ID and password that we talked about on</p> <p>8 Thursday, in which there were terms of service,</p> <p>9 limited use.</p> <p>10 This was not public information</p> <p>11 that's readily available. So by accessing the</p> <p>12 development environment, and giving Pega access to</p> <p>13 all of their documentation, that was also sensitive</p> <p>14 trade secrets that gave details of how the products</p> <p>15 worked, how they operated, and information that was</p> <p>16 not publicly available.</p> <p>17 Q. Now, from time to time, Appian makes</p> <p>18 improvements to its software; is that your</p> <p>19 understanding?</p> <p>20 A. That is correct.</p> <p>21 Q. Appian's software has a variety of</p> <p>22 features; is that correct?</p>

<p style="text-align: right;">Page 2231</p> <p>1 let's say there's a shape in the process for the 2 user interface, no one can change the user interface 3 even if you're working on the write to data store 4 piece because they're all linked from the process; 5 is that right? 6 SPEAKER1: Yeah. 7 SPEAKER2: Okay. 8 SPEAKER1: In Appian, you cannot do 9 that. 10 SPEAKER2: I mean, unless the write 11 to data store references a rule that's external, 12 then you can use that, but otherwise, you really 13 can't get at it. 14 SPEAKER1: (Inaudible) yeah. 15 SPEAKER2: So only one person can 16 work at it at one time? 17 SPEAKER1: Yes. Okay. 18 SPEAKER2: Okay. So that's a big 19 shortcoming. 20 SPEAKER1: Yeah, I mean, that's 21 actually -- (inaudible) like, for example, we have 22 like five people working on the same project, and</p>	<p style="text-align: right;">Page 2233</p> <p>1 actually go in and utilize any of the other 2 processes. 3 And then after this conversation or 4 video, I saw communication within Pegasystems where 5 they said, oh, this is why Appian only sends one 6 sales engineer to do a demo. We need to push 7 customers to always have multiple sales engineers or 8 multiple concurrent processes. 9 Q. Thank you, Dr. Cole. 10 I believe you also identified web 11 services as one of the trade secrets misappropriated 12 by the defendants in this case, and you gave your 13 definition of web services. 14 Could you just remind the jury, what 15 again is web service data return in Appian's 16 platform? 17 A. So when you run a web service, there's a 18 lot of information on what's happening within that 19 process, but Appian's software only returns the 20 process ID. So it only returns that one piece of 21 information. 22 But then the other component of the</p>
<p style="text-align: right;">Page 2232</p> <p>1 sometimes we -- like two or three people have to 2 working on same process sometimes, so we do 3 (inaudible) to, like, okay, can I -- (inaudible). 4 Okay, this process model. I mean, you have to have 5 communication going on. 6 SPEAKER2: Wow. 7 SPEAKER1: Yeah. So this process 8 doesn't really help. 9 SPEAKER2: Okay. That's 10 interesting. 11 (Video stopped.) 12 BY MR. GINSBERG: 13 Q. Dr. Cole, based on your review of these 14 two clips, can you describe your understanding as to 15 what Mr. Zou was conveying to Pegasystems here. 16 A. Yes. 17 He was not just merely saying that 18 you could only have one user in a process. He was 19 actually showing the development environment whereas 20 you can see there were multiple object flows or 21 tasks, and that represented a single process, and if 22 you were working in one process, you couldn't</p>	<p style="text-align: right;">Page 2234</p> <p>1 trade secret is in order to get additional 2 information, there's a complex process that you have 3 to go through in order to get additional details. 4 Q. What do you mean by process ID? 5 A. The process ID, or what we call in 6 computer science a PID, is just a unique number. So 7 every time you're running a process on your 8 computer -- I'm not sure in your home computer if 9 you've ever gone in and control-alt and look at the 10 running processes and you see random numbers. Those 11 are the PID or the process ID. 12 A number by itself doesn't really 13 give you a lot if you can't understand other issues 14 performance. So you want to then have to go in and 15 get additional information, but in Appian's 16 software, one of the trade secrets is that requires 17 a complex process to pull that data. 18 Q. Based on your review of the evidence in 19 this case, do you know how Pegasystems learned the 20 specifics about how web services data return works 21 in Appian's platform? 22 A. They got that directly from Zou in which</p>

<p style="text-align: right;">Page 2235</p> <p>1 he showed demos of the Appian Forum, and actually</p> <p>2 showed them exactly the process ID, that limitation,</p> <p>3 and then he actually went through and showed them</p> <p>4 the workaround that was required in order to get</p> <p>5 additional information.</p> <p>6 Q. Thank you.</p> <p>7 Can we call up Plaintiff's Exhibit</p> <p>8 1401.</p> <p>9 (Plaintiff's Exhibit 1401 was marked for</p> <p>10 identification.)</p> <p>11 MR. TRAVELL: Tab 37.</p> <p>12 BY MR. GINSBERG:</p> <p>13 Q. As Mr. Travell just noted, it does</p> <p>14 appear at Tab 37 of your binder.</p> <p>15 Do you recognize this document,</p> <p>16 Dr. Cole?</p> <p>17 A. Yes, I do.</p> <p>18 Q. What is this document?</p> <p>19 A. In addition to doing the live demos of</p> <p>20 the development platform --</p> <p>21 Q. One second, Dr. Cole.</p> <p>22 Can you just generally tell us what</p>	<p style="text-align: right;">Page 2237</p> <p>1 A. Yes, I do.</p> <p>2 Q. What does this pertain to?</p> <p>3 A. This is pertaining to the web services</p> <p>4 issue, where it's saying there, "Appian's</p> <p>5 integration is very limited. It only supports a</p> <p>6 small number of connectors and services."</p> <p>7 Then it goes on to say, sorry,</p> <p>8 "Significantly, it has no ability to return data</p> <p>9 when called via a web service. Without the ability</p> <p>10 to return information, customers will find it</p> <p>11 difficulty (as read) to integrate Appian in the</p> <p>12 situations where input is coming from other</p> <p>13 systems."</p> <p>14 Q. Do you see that there's certain</p> <p>15 questions that Mr. Petronio poses to Mr. Zou right</p> <p>16 under that quoted paragraph?</p> <p>17 A. Yes, I do.</p> <p>18 Q. If we can go to the most recent e-mail</p> <p>19 in this string, does Mr. Zou respond to</p> <p>20 Mr. Petronio?</p> <p>21 A. Yes, he does.</p> <p>22 Q. Beginning at the sentence that states,</p>
<p style="text-align: right;">Page 2236</p> <p>1 this document is.</p> <p>2 A. Oh, sorry.</p> <p>3 There is an e-mail from Mr. Zou to</p> <p>4 Pegasystems.</p> <p>5 MR. GINSBERG: Your Honor, we move</p> <p>6 for the admission of Plaintiff's Exhibit 1401.</p> <p>7 MR. BOOKBINDER: No objection.</p> <p>8 MR. TRAVELL: No objection, Your</p> <p>9 Honor.</p> <p>10 THE COURT: 1401 is admitted.</p> <p>11 (Plaintiff's Exhibit Number 1401 was admitted into</p> <p>12 evidence.)</p> <p>13 MR. GINSBERG: May we publish to the</p> <p>14 jury?</p> <p>15 THE COURT: You may.</p> <p>16 MR. GINSBERG: Thank you.</p> <p>17 BY MR. GINSBERG:</p> <p>18 Q. Now, do you see in the first e-mail, we</p> <p>19 can go from John Petronio to Mr. Zou. That's from</p> <p>20 March 5, 2013. There is a paragraph in quotes with</p> <p>21 reference to Appian's integration.</p> <p>22 Do you see that?</p>	<p style="text-align: right;">Page 2238</p> <p>1 "The way Appian web services worked..."</p> <p>2 Do you see that?</p> <p>3 A. Yes, I do.</p> <p>4 Q. What information is Mr. Zou providing</p> <p>5 about Appian web services and how it works?</p> <p>6 A. He's explaining basically how it works</p> <p>7 in terms of the limitation, but then he's also</p> <p>8 explaining what the workaround is that you need to</p> <p>9 do if you want to get additional information besides</p> <p>10 just the process ID.</p> <p>11 Q. How did Mr. Zou obtain this information?</p> <p>12 A. From working directly within the</p> <p>13 development environment, Appian Forum, which</p> <p>14 represents Appian's trade secrets, and these e-mails</p> <p>15 are a follow-up to actually working in that</p> <p>16 environment and pulling out very specific details of</p> <p>17 Appian's trade secrets.</p> <p>18 Q. Thank you.</p> <p>19 Another misappropriated trade secret</p> <p>20 that you identified is checkpointing; is that</p> <p>21 correct?</p> <p>22 A. That was also correct.</p>

<p style="text-align: right;">Page 2247</p> <p>1 A. This is talking about the ability to 2 export data into other protocols or other systems, 3 and this is referring to the star schema, which is 4 also one of the other trade secrets that Pegasystems 5 learned from Zou. 6 Q. Okay. 7 Could we call up another exhibit 8 that's already been admitted into evidence. It's 9 Plaintiff's Exhibit 210. 10 (Previously marked Plaintiff's Exhibit 210 was 11 presented.) 12 MR. TRAVELL: Tab 6. 13 BY MR. GINSBERG: 14 Q. Do you recognize this document, 15 Dr. Cole? 16 A. Yes, I do. 17 Q. What is the title of this document? 18 A. "Understanding Appian." 19 Q. Have you also heard this referred to as 20 a technical competitive brief? 21 A. Yes, I have. 22 Q. Does this document contain some of</p>	<p style="text-align: right;">Page 2249</p> <p>1 sorry. That they obtain from Mr. Zou. Sorry. 2 If we go to the first bullet on 3 column 1, do you see there's a reference to "All 4 in-flight processes and application logic lives in a 5 risky in-memory database with undesirable 6 performance tradeoffs"? 7 A. Yes, I do. 8 Q. Is this information about Appian 9 software platform that Mr. Zou provided to 10 Pegasystems? 11 A. Yes, it is. This is referring directly 12 to the checkpointing. So whenever you are talking 13 about volatile memory and information at risk, and 14 then writing it to the hard drive has performance 15 tradeoffs, that's directly tying to the checkpoint 16 trade secrets. 17 Q. Okay. 18 If we can go to, again, on the first 19 page of this document, the second column, the second 20 bullet, that begins "Administrators" -- or has a 21 heading "Administrators have no unified management 22 tools."</p>
<p style="text-align: right;">Page 2248</p> <p>1 Appian's trade secrets at issue? 2 A. Yes, it does. 3 Q. Do you know whether Pegasystems used 4 this document in competition with Appian? 5 A. Yes, they did. 6 Q. How did they use it? 7 A. They used this in a couple of ways. 8 So one is they used it to train up 9 their internal sales team so they would understand 10 some of the limitations with Appian's software so 11 they could differentiate and/or compete to win 12 business. 13 It's my understanding that they also 14 gave this "Understanding Appian" to some customers 15 to basically point out some of the issues within 16 Appian, so Pegasystems could differentiate, compete 17 and ultimately win business. 18 Q. Let's take a little bit of a closer look 19 at some of the information that Pegasystems included 20 in this document that was derived from information 21 they obtained from Dr. Cole (sic). 22 If we go to the first bullet -- I'm</p>	<p style="text-align: right;">Page 2250</p> <p>1 Do you see that? 2 A. Yes, I do. 3 Q. What is being discussed here? 4 A. This is one of the other trade secrets 5 that I mentioned a little earlier, was Appian 6 doesn't have unified management tools, which means 7 it doesn't have ways to manage the performance of 8 all the running processes on the system. 9 Q. Staying with Plaintiff's Exhibit 210, 10 could we go to the second page of this document, and 11 can we call up the second bullet in the first column 12 on this page that has the heading "Can't report with 13 external process data." 14 Based on your review of the 15 documents in this case, Dr. Cole, is it your 16 understanding that this was derived from information 17 that Mr. Zou provided to Pegasystems? 18 A. Yes, it is. When we are talking about 19 "can't report with external process data," this was 20 referring to the star protocol earlier that Appian 21 doesn't support, and this information came directly 22 from Zou to Pegasystems.</p>

16 (Pages 2247 - 2250)

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1 Q. Okay.

2 If we can just go down a little bit

3 further in this document. Do you see there's a

4 bullet "Appian lacks concurrent developer support,

5 greatly slowing down time to market"?

6 A. Yes, I do.

7 Q. Is this information that was derived

8 from information Mr. Zou provided to Pegasystems?

9 MR. BOOKBINDER: Objection.

10 Leading.

11 THE COURT: Sustained.

12 BY MR. GINSBERG:

13 Q. Do you recognize any other trade secrets

14 that Mr. Zou provided to Pegasystems in this

15 document?

16 MR. BOOKBINDER: Objection.

17 Leading.

18 THE COURT: Overruled.

19 BY MR. GINSBERG:

20 Q. You can answer, sir.

21 A. Yes. Concurrent development, that was

22 one of the first trade secrets I mentioned, which is

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1 within Appian's environment, you can only have one

2 developer working within a process at a given time,

3 and when they do, it locks the process and no one

4 else -- no other developers can access any of the

5 other objects within the process.

6 Q. Could we go to the -- sorry.

7 Could we just call up the entire

8 page of that document, please, for one second.

9 Thank you.

10 Turning to the second column on this

11 page, do you see that there's reference to "Appian's

12 integration is limited and requires time-consuming

13 workarounds?

14 A. Yes, I do.

15 Q. What is this in reference to?

16 A. This is in reference to the web services

17 trade secret where the web services will only return

18 a process ID, or what I called the PID earlier, and

19 in order to get additional information or additional

20 details, you have to do a complex workaround, which

21 Zou actually provided that workaround to

22 Pegasystems.

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1 Q. Now, are you aware of evidence showing

2 that Pegasystems actually used the Appian

3 information that it obtained from Mr. Zou to train

4 its salespeople?

5 A. Yes, I am.

6 Q. Let's call up another clip, if we could.

7 Could we call up clip number 4. And this is from

8 Plaintiff's Exhibit 875, which has already been

9 admitted into evidence.

10 (Previously marked Plaintiff's Exhibit 875 was

11 presented.)

12 (Video played.)

13 SPEAKER2: Another important aspect

14 of this architecture that you need to be aware about

15 is the concept of a checkpoint. A backup mechanism

16 is built into this solution, which essentially dumps

17 the contents of the in-memory database out to a hard

18 disk. This is called the checkpoint. And while it

19 is being done, the performance of the system is

20 dramatically slowed; therefore, checkpoints are

21 typically done at intervals such as 30 minutes or an

22 hour, because doing so more frequently would result

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1 in unacceptable performance.

2 (Video stopped.)

3 Q. What is being discussed here and how is

4 Mr. Petronio, I believe, who is talking, using this

5 information?

6 A. So Mr. Petronio had multiple demos and

7 meetings with Zou, and he took that information from

8 Zou and he created these series of videos that were

9 used directly to train the salespeople at

10 Pegasystems.

11 Q. Could we call up slide 32 of Dr. Cole's

12 presentation.

13 Now, does Pegasystems deny that they

14 learned new information about Appian's platform from

15 Zou?

16 MR. BOOKBINDER: Objection.

17 THE COURT: What's the basis of the

18 objection?

19 MR. BOOKBINDER: It's hearsay.

20 THE COURT: Mr. Ginsberg.

21 MR. GINSBERG: We have testimony

22 that's cited on the slide. They did not object to

<p style="text-align: right;">Page 2407</p> <p>1 often considered trade secrets that you don't want 2 to generally be publicly known. 3 Q. Right. 4 So if the prospective customers 5 didn't know about this, they would be -- might be 6 less likely to buy the Appian software; right? 7 A. Depending on how it's positioned by a 8 competitor. 9 Q. Okay. 10 Second area you testified about was 11 something I think you described as the lack of 12 concurrent developer support; is that right? 13 A. That was one of the other items, yes. 14 Q. All right. 15 So -- and the idea there is 16 essentially that only one person in a -- one person 17 at a time could work in a particular Appian 18 application; is that right? 19 A. It's actually a process. So an Appian 20 process that could have multiple objects, only one 21 user could access it because it would be locked. 22 Q. Okay. So one person at a time could</p>	<p style="text-align: right;">Page 2409</p> <p>1 limitations or those trade secrets, they could 2 overly emphasize it and utilize that as a strategic 3 way to provide economic value to them, and win 4 customers away from Appian. 5 Q. Okay. 6 And another area that you described 7 as a trade secret in this case related to process 8 ID; correct? 9 A. I think you're referring to the web 10 services return information. 11 Q. Right. The web services would return 12 only a process ID for -- if the Appian software was 13 connected to it; is that right? 14 A. That's the default that required a 15 complex workaround to provide additional 16 information. 17 Q. Fair to say, this is another shortcoming 18 weakness of Appian software; right? 19 A. This was a limitation of the software. 20 Q. All right. Final one I will ask you 21 about is related to scalability. There was 22 testimony -- you testified about that, I think,</p>
<p style="text-align: right;">Page 2408</p> <p>1 access this particular process; is that fair? 2 A. That is correct. 3 Q. This also was a weakness of Appian's or 4 a -- what -- limitation of Appian's software. Is 5 that the term that you used? 6 A. That was the term I used. 7 Q. So this lack of concurrent developer 8 support was another limitation on Appian software; 9 right? 10 A. That is correct. 11 Q. And again, Appian kept information about 12 that limitation secret; correct? 13 A. That is one of their trade secrets, yes. 14 Q. Again, it's your opinion that concealing 15 from its customers Appian's lack of concurrent 16 developer option had economic value; right? 17 A. Yes, it did. 18 Q. Because if prospective customers knew 19 about this shortcoming, they might be less likely to 20 buy Appian software; is that your testimony? 21 A. I would say it's a little more specific 22 that if a competitor of Appian knew about those</p>	<p style="text-align: right;">Page 2410</p> <p>1 maybe on Thursday; right? Scalability? 2 MR. GINSBERG: Objection. I believe 3 that's beyond the scope of direct. 4 MR. BOOKBINDER: Let me rephrase. 5 BY MR. BOOKBINDER: 6 Q. In your review of Appian's information 7 that Appian claimed was trade secrets, did you 8 review information related to Appian's lack of 9 scalability? 10 MR. GINSBERG: Beyond the scope of 11 direct. 12 THE COURT: Yes. Sustained. 13 BY MR. BOOKBINDER: 14 Q. The weaknesses that we've just gone 15 through with Appian software, these are things that 16 Mr. Zou was aware of because he was using the Appian 17 software; correct? 18 A. Once again, I referred to them as 19 limitations, but Zou was familiar with it because he 20 had access to the development platform that 21 contained those trade secrets. 22 Q. And anyone else who was a developer</p>

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1 CERTIFICATE OF COURT REPORTER

2 I, MARJORIE PETERS, Fellow of the Academy of
3 Reporting, Registered Merit Reporter, Certified
4 Realtime Reporter, Realtime Systems Administrator,
5 Notary Public, the officer before whom the foregoing
6 proceeding was taken, do hereby certify that the
7 witnesses whose testimony appears in the foregoing
8 hearing were duly sworn; that the testimony was
9 taken in shorthand and thereafter reduced to
10 typewriting by me or under my direction; that this
11 transcript is a true record of the proceedings; that
12 I am neither counsel for, related to, nor employed
13 by any of the parties to the action in which this
14 hearing was taken; and, further, that I am not a
15 relative or employee of any attorney or counsel
16 employed by the parties hereto, nor financially or
17 otherwise interested in the outcome of this action.

18

19

20



21 Marjorie Peters, FAPR, RMR, CRR, RSA

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IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - -

APPIAN CORPORATION,)

)

Plaintiff,) Civil Action No.

) 2020-07216

vs.)

)

PEGASYSTEMS INC., & YOUYONG)

ZOU,)

)

Defendants.)

TRIAL - DAY 11

BEFORE THE HONORABLE RICHARD GARDINER

Thursday, April 7, 2022, 9:37.a.m.

FAIRFAX COUNTY CIRCUIT COURT

4110 Chain Bridge Road

Fairfax, Virginia

Reported By: Marjorie Peters, FAPR, RMR, CRR, RSA

Job Number: 5098816

<p style="text-align: right;">Page 3244</p> <p>1 because Dr. Marshall testified, very clearly, 2 that -- he talked about five foundational 3 improvements. He said that Pega's product would 4 have been obsolete if they had not stolen this 5 information from Appian. 6 So that is absolutely an appropriate 7 foundation. 8 Second of all, what Mr. Frank is 9 really saying is that he disagrees with Appian's 10 case. That doesn't surprise me. He has factual 11 disagreements with various things. 12 So, fine, go ahead, cross-examine 13 the witnesses on your factual disagreements and the 14 jury will decide who is right. That's why we're 15 here. That is not an objection. In fact, none of 16 this is an objection. 17 Third, what he is making is a 18 premature motion to strike, which the Court cannot 19 evaluate until all of the evidence is in. If he 20 wants to contends that Appian's evidence is somehow 21 insufficient, that's the stage at which he should 22 make it. He can't make it here.</p>	<p style="text-align: right;">Page 3246</p> <p>1 THE COURT: There was something he 2 said early on about methodology. 3 MR. FRANK: Yes. He did not use a 4 proper methodology to determine the amount of 5 damages to which he is going to testify because the 6 underlying assumptions stated in his expert report, 7 and that's the only thing I can go on at this 8 moment, are unsupported by the record as it exists. 9 He quotes certain -- 10 THE COURT: So it's not the 11 methodology, then. It's the facts applied to the 12 methodology. 13 MR. FRANK: Well, in addition, for 14 example, he has already testified that the parties 15 are head-to-head competitors, without acknowledging 16 that the majority of Pega's sales are not made -- 17 THE COURT: Mr. Frank, that's a 18 factual dispute for cross-examination. And I 19 noticed in your argument, you had a number of times 20 where you said, whereas, in fact, and when you say, 21 whereas, in fact, that's cross-examination material. 22 That's not a legal basis for preventing him from</p>
<p style="text-align: right;">Page 3245</p> <p>1 Fourth and finally, since now we are 2 just previewing arguments, when we do get to the 3 motion to strike, first of all, under any analysis, 4 we have satisfied our causation burden, and that's 5 going to be the case no matter what. 6 But when it comes to the calculation 7 of damages, this is a trade secrets case. There is 8 burden shifted. Every argument that Mr. Frank just 9 made is going to boomerang on him because, in fact, 10 it's going to be his failure to carry his burden. 11 But all of that is for another day. 12 Now, the witness is here to testify. 13 His slides have been approved. There's nothing 14 objectionable about his testimony. Nothing 15 Mr. Frank just said constitutes an objection. 16 THE COURT: What was the first 17 objection you raised? 18 MR. MANGI: That Mr. -- he said that 19 his opinions are based on pervasiveness, but 20 Dr. Marshall testified to five discrete changes. 21 It's just argument about the weight of the evidence. 22 That is not an objection.</p>	<p style="text-align: right;">Page 3247</p> <p>1 testifying. 2 So I will overrule the objection. 3 (End SIDEBAR.) 4 THE COURT: All right. The 5 objection is overruled. 6 Mr. Faridi. 7 MR. FARIDI: I forgot where I was, 8 Your Honor. Just a moment. I think I know where I 9 was. 10 BY MR. FARIDI: 11 Q. Mr. Malackowski, can you walk the jury 12 through at a very high level the steps that you 13 undertook to calculate the damages in this case? 14 A. Yes. 15 At a very high level, I broke the 16 accounting down into two different analyses. The 17 first was to look at sales where there was direct 18 competition between Appian and Pega, and to 19 determine what the profits were that Pega made on 20 those transactions. 21 Then the second calculation was to 22 look more broadly at the platform that's asserted to</p>

<p style="text-align: right;">Page 3248</p> <p>1 contain the trade secrets overall, and look at the 2 profits that Pega made that included the trade 3 secrets. 4 Q. Let's focus on the direct competition 5 part of the analysis. What's the damages 6 calculation that you arrived at? 7 A. So that's in the first column shown on 8 the screen. 9 So I began by looking at the revenue 10 in those competitions. Basically, how much cash did 11 Pega collect in competition with Appian with product 12 that contained the trade secrets or was informed by 13 the trade secrets in the sale. That -- and that 14 amount was \$1.4 billion. 15 Once that was known, I then went to 16 the Pega accounting records to deduct the cost of 17 that product, the direct material, the direct labor, 18 and the variable expenses there were incurred in 19 order to sell that product. 20 When you make those deductions, the 21 profits that I found to be attributable to the 22 misappropriation, in direct competition, was</p>	<p style="text-align: right;">Page 3250</p> <p>1 \$3,032,847,000. That of course is the second most 2 important number in my analysis. 3 Q. Did you also calculate Mr. Zou's profits 4 attributable to misappropriation? 5 A. Yes. As noted at the bottom of the 6 screen, Mr. Zou was paid during 2012 to 2014, 7 \$23,608. 8 Q. Mr. Malackowski, what information did 9 you review in connection with your work in this 10 case? 11 A. It was significant. 12 What I show on the screen are three 13 general categories of our work. The first is as an 14 expert, I signed an agreement of confidentiality. 15 So I'm allowed to look at the business records for 16 both Appian and Pega, and there were thousands of 17 pages that I and my team went through. 18 Second, the interviewing process. I 19 was able to interview Appian witnesses -- executives 20 directly, but not so far Pega. In order for me to 21 get information from Pega, I sent the lawyers 22 questions, they asked them in depositions. I'm</p>
<p style="text-align: right;">Page 3249</p> <p>1 \$479,029,000. 2 So that would be one of the two most 3 important numbers in my work. 4 Q. What do you mean by the phrase "direct 5 competition with Appian"? 6 A. So specifically that instance where we 7 know from the documents that Appian and Pega were 8 competing for the same customer, for the same sale, 9 at the same time. 10 Q. Focusing now on the \$3 billion number; 11 can you walk us through your calculation at a very 12 high level? We're going to come back to the details 13 later. 14 A. Sure. 15 The analysis was similar in that I 16 began first by looking at revenue. How much cash 17 could Pega earn on product sales that allegedly 18 contained misappropriated trade secrets. That was 19 just over \$6.6 billion. 20 I went through the same cost 21 analysis, and then determined that the profits 22 attributable to the misappropriation would be</p>	<p style="text-align: right;">Page 3251</p> <p>1 guessing you've seen some depositions through this 2 trial. I reviewed those. 3 Third, there's the legal pleadings 4 in the case; specifically, written answers to 5 questions, which are called interrogatories. Some 6 of those questions were specifically what sales were 7 you competing with against Appian, and Appian what 8 sales were you competing with against Pega. 9 Then there were also expert reports 10 that I reviewed as well as part of this case. 11 MR. FARIDI: Your Honor, may I 12 approach? 13 THE COURT: You may. 14 BY MR. FARIDI: 15 Q. I've given you a binder containing some 16 documents. Can you describe, generally speaking, 17 what these documents are? 18 A. Yes. This is actually a subset, a small 19 portion of the documents that I reviewed and relied 20 on in this case. 21 These are essentially Pega documents 22 or Pega answers to legal questions.</p>

11 (Pages 3248 - 3251)

<p style="text-align: right;">Page 3296</p> <p>1 Salesforce, that it wasn't just cold e-mails, it</p> <p>2 wasn't just a training, but it was an opportunity</p> <p>3 for them to ask questions and really make sure they</p> <p>4 understood the benefit.</p> <p>5 Q. So we have spoken about sales and</p> <p>6 marketing and the training.</p> <p>7 How else did Pega misappropriate</p> <p>8 Appian's trade secrets?</p> <p>9 MR. FRANK: Objection.</p> <p>10 THE COURT: What's the basis?</p> <p>11 MR. FRANK: The question includes a</p> <p>12 legal conclusion.</p> <p>13 THE COURT: All right. I'll sustain</p> <p>14 the objection. Why don't you rephrase.</p> <p>15 BY MR. FARIDI:</p> <p>16 Q. How else did Pega use Appian's</p> <p>17 information provided by Mr. Zou?</p> <p>18 A. It was also used in modification of the</p> <p>19 Pega product, or making improvements to the Pega</p> <p>20 product itself, as I described on the screen.</p> <p>21 Here's five examples from Smart Shapes, ease of</p> <p>22 editing, custom data types, social and mobile.</p>	<p style="text-align: right;">Page 3298</p> <p>1 Q. So let's go to the last part of your</p> <p>2 analysis, the damages calculation.</p> <p>3 I want to focus first on the \$479</p> <p>4 million number.</p> <p>5 A. Yes, sir.</p> <p>6 Q. Can you tell the jury the number of</p> <p>7 times Pega and Appian competed, as you put it,</p> <p>8 directly between 2013 and 2021?</p> <p>9 A. Yes.</p> <p>10 I was able, through the record of</p> <p>11 the litigation, identify each one of those</p> <p>12 instances. It happened 201 times, according to the</p> <p>13 records in this case. And you can see how it</p> <p>14 started in 2013, but it ramped up through 2018 to</p> <p>15 2019. 2020 has COVID pandemic effect to it, but</p> <p>16 basically, it was a continual competition utilizing</p> <p>17 the trade secrets.</p> <p>18 Q. What type of data did you analyze in</p> <p>19 connection with your analysis of Pega's profits?</p> <p>20 A. I went to the accounting data, the</p> <p>21 detailed accounting records.</p> <p>22 So what's shown on the screen here</p>
<p style="text-align: right;">Page 3297</p> <p>1 Importantly, these were changes of</p> <p>2 significant that without these changes to the</p> <p>3 platform, the platform would not have been</p> <p>4 competitive in the market, and that's really</p> <p>5 critical.</p> <p>6 Q. Why is that critical?</p> <p>7 A. Because it speaks to the importance of</p> <p>8 the trade secrets, and it also speaks to the</p> <p>9 economic significance in the competition.</p> <p>10 So now, remember, we have not just</p> <p>11 any competitors, we have head-to-head primary</p> <p>12 competitors, and one of them has access to the</p> <p>13 playbook of the other, the trade secret information.</p> <p>14 Without that access and actually</p> <p>15 changing their own product to compete with Appian,</p> <p>16 they would not have had a successful product. So</p> <p>17 from Appian's perspective, they're competing against</p> <p>18 someone who knows their confidential data, and</p> <p>19 they're also competing against someone who is</p> <p>20 offering their technology. They're competing</p> <p>21 against themselves, and that's critical in a</p> <p>22 head-to-head competition.</p>	<p style="text-align: right;">Page 3299</p> <p>1 is an example of the Pega accounting ledger. I have</p> <p>2 highlighted one direct competitive account,</p> <p>3 Rabobank, and you can see for the customer, the</p> <p>4 records show the revenues by year, and what type of</p> <p>5 revenues were recorded; from maintenance revenues,</p> <p>6 product licenses, services, consulting and cloud</p> <p>7 revenues.</p> <p>8 Q. All right. So let's focus on the</p> <p>9 revenue.</p> <p>10 What type of revenue did Pegasystems</p> <p>11 obtain from each of these 201 customers that you</p> <p>12 spoke about earlier?</p> <p>13 A. So I totaled it up for each of those 201</p> <p>14 customers, for each of those categories.</p> <p>15 So the license revenue is the</p> <p>16 primary product permission. The maintenance are the</p> <p>17 continual contracts you pay to get the updates and</p> <p>18 bug fixes, patches, that sort of thing.</p> <p>19 Services and consulting are really</p> <p>20 the same; that is the professionals who help to</p> <p>21 implement, provide consulting time.</p> <p>22 And then cloud is a separate charge</p>

<p style="text-align: right;">Page 3304</p> <p>1 misappropriation where it competed directly with 2 Appian? 3 A. Yes. 4 So starting with the revenue of 5 1,417,126,000, I subtracted the cost of revenue and 6 the variable expenses to determine the profits 7 attributable to the misappropriation when in direct 8 competition at \$479,029,000. 9 Q. Let's go to the products improvements 10 part of the calculation. 11 How did you begin this analysis? 12 This is a \$3 billion analysis. 13 A. It's really a \$6 billion analysis, but I 14 started by understanding when the trade secrets were 15 incorporated into the Pega product. That began with 16 Version 7.1 in the third quarter -- at the end of 17 the third quarter of 2013. So starting in Q4, all 18 of the product that was being sold had a nexus or 19 connection or use of the trade secrets. 20 So then I simply went and totaled 21 the platform revenues through the last data that I 22 had, Q3 of 2021. I, again, eliminated the earlier</p>	<p style="text-align: right;">Page 3306</p> <p>1 deposition record of the case, Mr. Stillwell 2 explained that in all cases, even if you are 3 interested in applications, you still need a license 4 to the platform, and substantially all of the 5 revenues are associated with the platform, 7.1 and 6 more current. 7 Q. Who is Mr. Stillwell? 8 A. He is the chief financial officer. I 9 think he also has a chief operating officer position 10 at Pega. 11 Q. Can you go to Tab 16, this is 12 Plaintiff's 823. 13 A. Yes. 14 (Plaintiff's Exhibit 823 was marked for 15 identification.) 16 BY MR. FARIDI: 17 Q. Can you describe for us just generally 18 what this document is? 19 A. In the beginning of my testimony, I 20 described some of the information I looked at were 21 written answers by the parties in the litigation. 22 This is an example of that. It's</p>
<p style="text-align: right;">Page 3305</p> <p>1 contracts that I had eliminated before. 2 When you total those revenues, it's 3 \$6.6 billion. 4 Q. There's a notation at the bottom of the 5 slide here. Can you read that out loud and describe 6 for us what you meant to convey? 7 A. Yes. 8 I "eliminated revenues for Pega's 9 contracts that closed prior to Zou's engagement." 10 Again, that is the same adjustment I 11 made to the direct competition, to not try to 12 capture profits for sales that were made before Zou 13 disclosed the trade secrets. 14 Q. Now, what type of revenue did you 15 account for? 16 A. Same categories of revenue; the license 17 itself, as well as the maintenance, services and 18 consulting and cloud fees. 19 Q. Now, did you investigate whether Pega 20 has any revenue for lines of business that are not 21 tied to its platform? 22 A. I did. Specifically, if you go to the</p>	<p style="text-align: right;">Page 3307</p> <p>1 called an interrogatory. So one side sends 2 questions to the other. The other side, through 3 their lawyers, write down the answers and send them 4 back. 5 This is an answer Pega gave. 6 MR. FARIDI: Your Honor, we offer 7 Plaintiff's 823. 8 MR. FRANK: No objection, Your 9 Honor. 10 MR. TRAVELL: No objection. 11 THE COURT: 823 is admitted. 12 (Plaintiff's Exhibit Number 823 was admitted into 13 evidence.) 14 BY MR. FARIDI: 15 Q. So let's focus on Interrogatory Number 16 18 and Pegasystems's response to it. 17 Can you tell us how the 18 interrogatory and the response to it bears on your 19 analysis? 20 A. Yes. 21 The question was, Appian asked Pega 22 to identify all revenues received by Pega for each</p>

25 (Pages 3304 - 3307)

<p style="text-align: right;">Page 3324</p> <p>1 improvements, the product would not have been 2 commercially viable. 3 Q. The jury can decide whether 4 Dr. Marshall, in fact, so testified. 5 The -- 6 MR. FARIDI: Objection, Your Honor, 7 to the preamble. 8 THE COURT: Yeah. Sustained. 9 BY MR. FRANK: 10 Q. It's correct, is it not, that it is your 11 brief that -- is it correct that it doesn't matter 12 what product was involved, what competitor was 13 involved, and that Pega would have lost every single 14 sale that it made, every single sale that it made 15 for over a period of eight years; is that your 16 testimony? 17 A. No, I -- 18 MR. FARIDI: Objection. Asked and 19 answered. 20 THE COURT: Sustained. 21 THE WITNESS: No, you're -- 22 THE COURT: Sir.</p>	<p style="text-align: right;">Page 3326</p> <p>1 Dr. Marshall concluded that the product would not be 2 viable, but you don't need to reach that conclusion 3 to award the damages that I suggest, because I'm 4 just looking for the profits that were made in 5 actuality with the trade secrets. 6 I'm not talking about what would 7 have happened but for use of the trade secrets. 8 Q. Did the companies that -- it's correct, 9 is it not, that with respect to your product 10 improvement theory, better than 80 percent of the 11 sales transactions in question did not involve 12 Appian in any way? 13 A. I didn't follow that question. Could 14 you start -- re-read that? 15 Q. Sure. Let me -- because I'm not able to 16 remember exactly what I said, I'll see if I can ask 17 it again. 18 It's correct, sir, is it not, that 19 with respect to your product improvement theory, 20 better than 80 percent of the sales transactions in 21 question did not involve Appian in any way? 22 A. Not that we can tell because, remember,</p>
<p style="text-align: right;">Page 3325</p> <p>1 THE WITNESS: Oh, I'm sorry. 2 THE COURT: The objection is 3 sustained. 4 THE WITNESS: Oh. 5 THE COURT: You already answered the 6 question. 7 BY MR. FRANK: 8 Q. So it's your testimony, is it not, that 9 Pega's sales would have dropped from \$461 million in 10 2012, would have dropped to zero beginning on -- in 11 October of 2013, and would have remained at zero for 12 the next eight years; is that your testimony? 13 A. No, you're not -- you're 14 misunderstanding my analysis. 15 My analysis is that all of those 16 sales benefited from the trade secrets. So if you 17 are looking for the unjust enrichment, the profit 18 that was earned from the trade secrets, all of it is 19 relevant. 20 Now, I didn't offer the opinion that 21 but for there would have been a lost profits 22 calculation for Appian. I understand that</p>	<p style="text-align: right;">Page 3327</p> <p>1 the direct Appian sales were about 1.4 billion, and 2 the total sales were 6.6 billion, so 1.4 is about 20 3 percent of the total, but there are sales we don't 4 know because of the fox in the henhouse and all of 5 the attempt to interfere with the proof of concept 6 or RFPs. 7 Q. I want to start with your theory that if 8 it were not for six pieces of information that 9 Mr. Cole -- Dr. Cole said on Monday were trade 10 secrets that Pega included in Pega's marketing and 11 sales material, Appian would have beaten Pega every 12 single time that the two companies competed. 13 It's correct, sir, is it not, that 14 you assumed that what Dr. Cole identified as trade 15 secrets were actual secrets? 16 MR. FARIDI: Objection, Your Honor. 17 He wasn't here for Dr. Cole's testimony. He was not 18 allowed to be in the courtroom for that. 19 BY MR. FRANK: 20 Q. How many trade secrets do you 21 understand -- withdrawn. 22 What is the number of -- what</p>

Page 3428

1 Bookbinder proffered to me, I don't see that these
 2 have been -- that there was a manifestation of
 3 adoption or belief in their truth.

4 They're useful documents, I'm sure
 5 they are, but I don't think that takes the necessary
 6 step. This is unlike Mr. Schuerman stating where he
 7 plainly said that these were, in his view, the
 8 honest -- I think that was the word he used --
 9 honest statements, and therefore, clearly adopted
 10 them as the view of the corporation.

11 So that motion is denied.

12 MR. MANGI: Your Honor, may I ask,
 13 what time are we starting on Monday? Was it 10? I
 14 didn't hear.

15 THE COURT: Yes, sir. 10:00.

16 MR. MANGI: Thank you, Judge.

17 THE COURT: All right. Have a good
 18 weekend. The court is in recess.

19 (The proceedings were recessed for the day at
 20 1:16 p.m., to resume on Monday, April 11, at
 21 10:00 a.m.)
 22

Page 3429

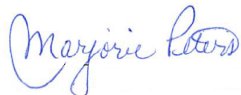
1 CERTIFICATE OF COURT REPORTER

2 I, MARJORIE PETERS, Fellow of the Academy of
 3 Reporting, Registered Merit Reporter, Certified
 4 Realtime Reporter, Realtime Systems Administrator,
 5 Notary Public, the officer before whom the foregoing
 6 proceeding was taken, do hereby certify that the
 7 witnesses whose testimony appears in the foregoing
 8 hearing were duly sworn; that the testimony was
 9 taken in shorthand and thereafter reduced to
 10 typewriting by me or under my direction; that this
 11 transcript is a true record of the proceedings; that
 12 I am neither counsel for, related to, nor employed
 13 by any of the parties to the action in which this
 14 hearing was taken; and, further, that I am not a
 15 relative or employee of any attorney or counsel
 16 employed by the parties hereto, nor financially or
 17 otherwise interested in the outcome of this action.
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 Marjorie Peters, FAPR, RMR, CRR, RSA

56 (Pages 3428 - 3429)

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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APPIAN CORPORATION,)

)

Plaintiff,) Civil Action No.

) 2020-07216

vs.)

)

PEGASYSTEMS INC., & YOUYONG)

ZOU,)

)

Defendants.)

TRIAL - DAY 12

BEFORE THE HONORABLE RICHARD GARDINER

Monday, April 11, 2022, 10:00 a.m.

FAIRFAX COUNTY CIRCUIT COURT

4110 Chain Bridge Road

Fairfax, Virginia

Reported By: Marjorie Peters, FAPR, RMR, CRR, RSA

Job Number: 5123235

<p style="text-align: right;">Page 3483</p> <p>1 Then he says, "Highlighting rules 2 inheritance by Pega simply highlights the larger 3 issue with Appian around change control and 4 management such as discovery of related objects and 5 impact analysis like implementing a change as well 6 as complex rules support." 7 Do you see that, sir? 8 A. I do. 9 Q. You understand that to be an 10 acknowledgement that this is a feature that Appian 11 did not possess as of -- that rules inheritance was 12 a feature that Appian did not possess as of the 13 times of these e-mails, which are March of 2013? 14 A. No. It's not that they didn't possess 15 the ability for one program to take over the other. 16 They didn't use the old rules inheritance structure. 17 They used a dynamic structure. 18 So what they ultimately decided to 19 do, they said, this is a matter of customer 20 confusion, so let's publish what we do in detail so 21 everybody understands it, and this issue goes away. 22 So this is the type of information</p>	<p style="text-align: right;">Page 3485</p> <p>1 inheritance, and had everything to do with what are 2 now said to be trade secrets? 3 A. No, that's a slightly different 4 question. That's not my opinion. 5 My opinion is that Pega used the 6 trade secrets to obtain the Rabo account, period, 7 stop. 8 There were other things that were at 9 issue in the sale, one of which is rules 10 inheritance. It is my view that in the but-for 11 world where rules inheritance was still a confusing 12 issue, but Pega did not have the trade secret 13 technology to offer, in that case, the sale would 14 have gone to Appian. 15 Q. Now, the -- you're aware, are you not, 16 sir, that these events all occurred in March of 17 2013? 18 A. These e-mails occurred in March of 2013, 19 yes, sir. 20 Q. You're aware, are you not, that Appian's 21 understanding at that time was that it had lost the 22 Rabobank opportunity because Appian did not have</p>
<p style="text-align: right;">Page 3484</p> <p>1 that I think ultimately was published in order to 2 solve the problem. 3 Q. Did Rabo remain a customer of Pega? 4 A. Yes, they did, using the trade secrets. 5 Q. Have you -- going on in the e-mail, the 6 next e-mail is an e-mail from a man named Bob Kramer 7 to -- I beg your pardon. 8 The next e-mail in sequence is 9 another e-mail from Mr. Edward Hughes. And 10 Mr. Hughes says, "Okay. All good input. Could I 11 suggest breaking it down." 12 "Why is this an issue? Tony hints 13 at Pega's architecture, but where does it come in to 14 play? How important is it? Is it a 5 percent issue 15 related to a very small minority of cases or is it a 16 big, honking issue that we face often?" (As read.) 17 Do you see that? 18 A. I do. It's a "honking problem," not 19 issue, but I see what you are reading. 20 Q. So let me stop there. It is still your 21 conclusion, is it not, sir, that Rabo's decision to 22 stay with Pega had nothing to do with rules</p>	<p style="text-align: right;">Page 3486</p> <p>1 rules inheritance -- a rules inheritance feature 2 comparable to Appian's (sic) feature? 3 A. At that time, Appian was not aware that 4 Pega was using its trade secrets, that's true. 5 Q. It's correct, is it not, that March of 6 2013 is prior to the introduction of any product 7 change that is at issue in this case? 8 A. Prior to product change, but after the 9 dissemination of the trade secret material to the 10 sales force. 11 Q. So there's nothing about a product 12 feature that affected Rabobank's decision; is that 13 correct? 14 A. That's not true. 15 There's nothing about the product 16 features within the Pega product, but the product 17 feature limitations of Appian, as communicated from 18 the trade secret documents, was all part of the 19 dynamics of the sale. 20 Q. But contemporaneously, no one at Appian 21 was identifying any such shortcoming in Appian's 22 product as the reason that Appian lost that</p>

15 (Pages 3483 - 3486)

<p style="text-align: right;">Page 3487</p> <p>1 opportunity. What they identified was the absence 2 of rules inheritance; is that right, sir? 3 A. Right. They didn't know that Pega was 4 using their trade secrets at the time, so they 5 didn't identify those as reasons. 6 MR. FRANK: Your Honor, it's 12:05. 7 It's entirely up to you. I'll go on or... 8 THE COURT: Do you want -- we can -- 9 this would be a good time. I didn't want to 10 interrupt your cross, unless I could. Is this a 11 good time to interrupt it? 12 MR. FRANK: This is a perfectly good 13 time, yes. 14 THE COURT: All right. Very good. 15 Ladies and Gentlemen, we'll take 16 what was the morning recess at this point. 17 (The jury exited the courtroom.) 18 THE COURT: Court is in recess. 19 (RECESS, 12:05 p.m. - 12:22 p.m.) 20 THE COURT: All right. Bring the 21 jury in, please. 22 (The jury entered the courtroom.)</p>	<p style="text-align: right;">Page 3489</p> <p>1 No. 2 So to be clear -- 3 THE COURT: Sorry. Could you pull 4 that microphone up a little bit. 5 Thank you, sir. 6 THE WITNESS: No. 7 To be clear, it's my testimony that 8 the Rabobank sale as well as the others were 9 associated with, had a nexus to, benefitted from, 10 the trade secret. 11 As we talked about on Thursday, I'm 12 not doing a but-for lost profits calculation. 13 BY MR. FRANK: 14 Q. Thank you, sir. 15 I want to ask you now about a 16 different situation that I believe you have studied. 17 You have studied, have you not, a 18 situation involving Amazon, which was at one time an 19 Appian customer? 20 A. At some level, sure. 21 Q. Yes. 22 That's set out -- you set out your</p>
<p style="text-align: right;">Page 3488</p> <p>1 THE COURT: All right. All Members 2 of the Jury are present. Everyone may be seated. 3 Mr. Frank, if you want to continue 4 your cross-examination, please. 5 MR. FRANK: Thank you, Your Honor. 6 CONTINUED CROSS-EXAMINATION 7 BY MR. FRANK: 8 Q. Mr. Malackowski, I may have misheard 9 something you said when we were talking about the 10 Rabobank situation, so I'll ask the question again, 11 and I apologize if I'm mischaracterizing something 12 you said. 13 Are you testifying that the but-for 14 cause of Rabobank's purchase from Pega in the 15 transaction included in your damage analysis was 16 the -- were the subset of the materials in Pega's 17 marketing material that are now alleged to be trade 18 secrets; in other words, that that sale would not 19 have been made if it had not been for those 20 statements? 21 Is that your testimony? 22 A. I think I understand your question.</p>	<p style="text-align: right;">Page 3490</p> <p>1 description of that transaction in your first expert 2 report; is that correct? 3 A. Amazon as well as a number of customers 4 are described in that report, yes. 5 Q. Yes. 6 It's correct, is it not, sir, 7 that -- and the Amazon situation is included in your 8 calculation of damages; is that correct? 9 A. Again, I'm not sure what you mean by 10 "the situation." 11 But the head-to-head competition for 12 Amazon would be connected to the profits analysis. 13 Q. Okay. 14 You reviewed the evidence relating 15 to the Amazon transaction; is that correct? 16 A. Generally. 17 Q. Okay. 18 It's your opinion -- is it your 19 opinion that Amazon chose Pega because of Pega's use 20 of the alleged -- what are now said to be trade 21 secrets by Appian? 22 A. Again, not a but-for lost profits</p>

16 (Pages 3487 - 3490)

Page 3623

1 evening.
 2 (The proceedings were recessed for the day at
 3 4:53 p.m., to resume on Tuesday, April 12, at
 4 10:00 a.m.)

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Page 3624

1 CERTIFICATE OF COURT REPORTER
 2 I, MARJORIE PETERS, Fellow of the Academy of
 3 Reporting, Registered Merit Reporter, Certified
 4 Realtime Reporter, Realtime Systems Administrator,
 5 Notary Public, the officer before whom the foregoing
 6 proceeding was taken, do hereby certify that the
 7 witnesses whose testimony appears in the foregoing
 8 hearing were duly sworn; that the testimony was
 9 taken in shorthand and thereafter reduced to
 10 typewriting by me or under my direction; that this
 11 transcript is a true record of the proceedings; that
 12 I am neither counsel for, related to, nor employed
 13 by any of the parties to the action in which this
 14 hearing was taken; and, further, that I am not a
 15 relative or employee of any attorney or counsel
 16 employed by the parties hereto, nor financially or
 17 otherwise interested in the outcome of this action.

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22 Marjorie Peters, FAPR, RMR, CRR, RSA

50 (Pages 3623 - 3624)